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IN THE

Supreme Court of the United States

AYSHA NUDRAT UNUS AND HANAA UNUS,

Petitioners,

v.

ROGER AARONS ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

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I. THIS COURT SHOULD REVIEW THE FOURTH CIRCUIT'S BROAD RULING THAT THE FOURTH AMENDMENT CATEGORICALLY PERMITS LENGTHY HANDCUFFING DURING SEARCHES IN NON-DANGEROUS CIRCUMSTANCES.

The petition for certiorari squarely presents the conflict between the Fourth Circuit's construction of the Fourth Amendment and *Muehler v. Mena*, 544 U.S. 692 (2005), and *Michigan v. Summers*, 452 U.S. 692 (1981), as well as decisions of the Ninth and Tenth Circuits. Given the obvious importance of the question

presented, which may arise in any search by state or federal officers, this Court's intervention is required. *See* Pet. 25-26.

1. The United States' reliance on the fact that agents were searching for "evidence related to a terrorism investigation," BIO 12, which it presumably recites to suggest the agents faced danger, misdescribes both the facts and the Fourth Circuit's legal holding.

Factually, the dozen-plus agents faced no risk, making it unreasonable to detain Dr. Unus' wife and daughter in handcuffs for four hours. The court of appeals held that the handcuffing satisfied the Fourth Amendment, notwithstanding that the agents were *not* "concerned about the Unus residence being connected to terrorism-related activity, and that they did *not* anticipate that the residence might house weapons or dangerous persons." *Id.* 23a (emphasis added). That was objectively right: no member of the Unus family has a criminal record; and there was no reason to believe weapons were at the residence.

Nor did the search's subject matter suggest risk. The "evidence" to which the United States so vaguely refers – which did not exist because the allegations were a sham, Pet. App. 11a n.8 – was "related" to "terrorism" only in an attenuated sense that suggested no danger: the government suspected that the so-called Safa Group "route[d] money" to groups related to terrorism; in turn, Dr. Unus allegedly "maintains [Safa Group financial] records at his house," creating "'probable cause to believe that the evidence of [federal law] violations' would be found at the Unus residence in the form of Safa Group *financial records*." Pet.

App 8a-9a (alterations in original) (emphasis added).

Consistent with the facts, the Fourth Circuit's legal holding authorizes multi-hour handcuffed detentions whenever the government seeks evidence as inherently non-dangerous as financial records. The government cannot identify any language cabining the ruling below. To the contrary, the court of appeals categorically held that the authority to handcuff all occupants under *Summers* and *Mena* is not limited to searches for contraband or dangerous materials, but instead "applies equally to situations where agents are seeking evidence of federal crimes." Pet. App. 29a n.22. Whether officers search for records of tax evasion, an antitrust conspiracy, or some other white collar crime is completely irrelevant under the Fourth Circuit's holding, and no one can doubt that the decision will be applied in precisely that manner.

The other facts on which the government leans similarly do not reduce the significant conflicts created by the ruling below. In every search, officers will "not *know* whether they would be confronted by resistance." BIO 13 (quoting Pet. App. 31a-32a) (emphasis added). Resistance is always possible in the wholly hypothetical sense it might have arisen here, despite all expectations to the contrary. But the premise of the ruling below is that the objective circumstances gave no reason to anticipate any resistance or danger from the Unus family, and in fact petitioners gave *no resistance*.

Similarly, residents will almost inevitably be initially "excite[d]" and "agitated," *id.* (quoting Pet. App. 32a), particularly when officers break into the

home with a battering ram and guns drawn, as the court of appeals itself acknowledged in correctly describing the entry as a "harrowing experience" for petitioners, Pet. App. 28a. Given that there were over a dozen armed federal agents on the scene, once calm was promptly restored, the hours-long continued handcuffing of two women suspected of no wrongdoing and who presented no danger was unreasonable.

2. The United States' argument that review is inappropriate because petitioners' claims under the Federal Tort Claims Act require them to prove that the agents committed a tort under Virginia law lacks merit.

a. As the United States explains, "[u]nder Virginia law, it is neither false imprisonment nor assault or battery for a police officer to restrain one's liberty or engage in unwanted touching if the officer's conduct was legally justified." BIO 10. "Justification," which is the only disputed element of petitioners' claims, is a question of *federal* law because a seizure that violates the Fourth Amendment obviously is not reasonable or "legally justified." The government repeatedly made precisely that point below: "Because the Commonwealth's law requires that, in order to recover for assault, battery or false arrest, the evidence establish that the detention or touching lacked adequate legal justification, at least insofar as it applies in a case such as this in which the conduct of a law enforcement officer is at issue, the Commonwealth's law of torts *incorporates* the Fourth Amendment's excessive force analysis." Gov't C.A. Br. 35 (emphasis added). *See also id.* 35-36 (addressing "the Fourth Amendment analysis

by which the question of 'legal justification' *is to be resolved*" (emphasis added)).[1]

The Fourth Circuit thus correctly explained that "[a] police officer's conduct in executing a search warrant is judged in terms of its reasonableness within the meaning of the fourth amendment to the United States Constitution and Article I, § 10 of the Constitution of Virginia." Pet. App. 25a (quoting *Lewis v. Commonwealth*, 493 S.E.2d 397, 399 (Va. 1997)).[2] Accordingly, in deciding petitioners' "false imprisonment and battery claims," the court of appeals did not cite Virginia law, but instead rested its ruling exclusively on the "consistent[] recogni[tion] that *the Fourth Amendment* protects a citizen's right to be free from unreasonable seizures." Pet. App. 29a (emphasis added). In turn, every precedent that the Fourth Circuit applied in evaluating petitioners' claims, *id.* 28a-33a, addressed only the Fourth Amendment, not state law: *Muehler v.*

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[1] Thus, while the FTCA does not technically address a "Fourth Amendment *claim*," BIO 9 (quoting Pet. 5) (emphasis added), it does turn entirely on the Fourth Amendment's *meaning*.

[2] The Virginia Constitution's privacy provision is "co-extensive" with the Fourth Amendment. *El-Amin v. Commonwealth*, 607 S.E.2d 115, 116 n.3 (Va. 2005); *accord Henry v. Commonwealth*, 529 S.E.2d 796, 798 (Va. App. 2000). That parallelism is common, and this Court consistently reviews such cases; the government does not contend otherwise. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 37 (1996); *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996) (per curiam); *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987); *Michigan v. Long*, 463 U.S. 1032, 1043-44 & n.10 (1983); *Delaware v. Prouse*, 440 U.S. 648, 651-53 (1979).

Mena; *Michigan v. Summers*; *Valladares v. Cordero*, 552 F.3d 384 (4th Cir. 2009); and *United States v. Photogrammetric Data Serv., Inc.*, 259 F.3d 229 (4th Cir. 2001).

The United States nonetheless claims that the Fourth Circuit relied on "the priority of officer safety under Virginia law," BIO 7, which the government pitches as a "[n]otabl[e]" basis for declining review, *id.* 10, because the court's Fourth Amendment analysis supposedly "was filtered through the lens of Virginia's emphasis on officer safety," *id.* 11. That would be a substantial argument if it were true, but in fact it is pure invention. The single sentence in question noted the reliance of a "Virginia" *court* on "the safety of the officer," Pet. App. 26a (quoting *Harris v. Commonwealth*, 400 S.E.2d 191, 194 (Va. 1991)); but it manifestly did not describe that as a proposition of "Virginia *law*," *contra* BIO 7 (emphasis added), for the understandable reason that the case decided only "whether a police officer violated the Fourth Amendment's prohibition against unreasonable searches and seizures." 400 S.E.2d at 192.[3]

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[3] The United States makes the identical glaring error in claiming that the ruling below "relied on Virginia law" with respect to petitioners' assault claim, BIO 11, though the government's point would be irrelevant even if true, because the petition concerns petitioners' distinct claims for battery and false imprisonment. *See* Pet. App. 26a (quoting *Lewis v. Commonwealth*, 493 S.E.2d 397, 399 (Va. App. 1997) (quoting, in turn, *Gladden v. Commonwealth*, 400 S.E.2d 791, 793 (Va. App. 1991) (applying, in turn, not state law but *Ker v. California*, 374 U.S. 23 (1963), and *Miller v. United States*, 357 U.S. 301 (1958)).

b. Contrary to the government's submission that this Court should not decide questions of federal law "in aid of the ultimate question whether" state law was violated, BIO 16, this Court consistently and regularly grants review in just these circumstances. *See, e.g.*, *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1442-43 & n.2 (2009) (state law claim for "breach of trust" required interpretation of federally enacted Apology Resolution); *Oregon v. Guzek*, 546 U.S. 517, 521 (2006) (evidence's "relevance" under state statute required determining scope of federal constitutional right to introduce mitigating evidence); *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (per curiam) (right to immunity under state statute based on application of Fifth Amendment right against self-incrimination); *Int'l Longshoremen's Ass'n. v. Davis*, 476 U.S. 380, 388 (1986) (state law determination of waiver depended on antecedent interpretation of federal labor law); *Arizona v. Evans*, 514 U.S. 1, 7, 10 (1995) (interpretation of "the Arizona good-faith statute, Ariz. Rev. Stat. Ann. § 13-3925 (1993)," turned on interpretation of Fourth Amendment).

We are aware of no counter-examples that would support the government's novel contrary position that federal law rulings in this frequently recurring posture should forever evade this Court's review. The United States' invocation of the *Stern & Gressman* treatise for the proposition that "[t]his Court does not generally review a federal court of appeal's determination of a question of state law," BIO 11 (citing *Supreme Court Practice* § 4.10, at 261 (9th ed. 2007) (citing, in turn, *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944)), is misplaced because the question here is

the meaning of the Fourth Amendment, not state law. The relevant point, which the government ignores, is that it is "'well established'" that this Court will decide a "federal question that has been incorporated in the state law." *Supreme Court Practice* § 3.23, at 212 (quoting *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 150, 152 (1984)).

Nor does the government identify any pragmatic basis for denying review. To the contrary, this Court's role is critical. At the urging of the United States, the Court has recently heavily emphasized civil suits, rather than the exclusionary rule, as the favored remedy for Fourth Amendment violations. *E.g.*, *Herring v. United States*, 129 S. Ct. 695 (2009); *Hudson v. Michigan*, 547 U.S. 586 (2006). Petitioners brought just such claims, and did so in the only way possible: as common law tort claims under the FTCA, together with a parallel Fourth Amendment *Bivens* claim that the court of appeals held was precluded by the dismissal of the FTCA claims. But now the United States reverses course and implausibly argues that - notwithstanding that petitioners' FTCA claims turn *entirely* on whether the agents' conduct violated the Fourth Amendment because the only disputed issue is whether the lengthy handcuffing was "legally justified" - it is the *state courts*, rather than this Court, that are the final arbiter of the federal Constitution's meaning in this federal lawsuit. However, "it is the province and duty of this Court 'to say what the law is.'" *United States v. Nixon*, 418 U.S. 683, 705 (1974) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

II. THIS COURT SHOULD REVIEW THE FOURTH CIRCUIT'S HOLDING THAT THE DISMISSAL OF AN FTCA CLAIM REQUIRES THE DISMISSAL OF CLAIMS AGAINST INDIVIDUAL DEFENDANTS IN THE SAME ACTION.

The Petition demonstrated that this Court should grant certiorari to resolve the widely acknowledged circuit conflict over whether the FTCA's judgment bar, 28 U.S.C. § 2876, applies to claims against individual defendants when an FTCA claim in the same action is dismissed.

1. The government's principal submission that petitioners waived this argument by not raising it in the court of appeals, BIO 16-18, is disingenuous because it omits that the judgment bar was not the basis for the ruling from which petitioners appealed.[4] Instead, the government invoked the judgment bar as an alternative basis for affirming the dismissal of petitioners' *Bivens* claims, and even then discussed the statute's meaning in only a *single paragraph*. *See* App., *infra*. Petitioners led their reply brief with a section responding to the government's reliance on the judgment bar. Pet. C.A. Br. Part I-A. The

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[4] *See* Pet. App. 19a, 21a (*Bivens* claims were dismissed on qualified immunity and limitations grounds); *id.* 101a-02a (after dismissing petitioners' FTCA claims on the ground that the agents' conduct was not "inherently unreasonable given all of the factors involved," district court ruled that petitioners' motion for reconsideration of the dismissal of their First Amendment *Bivens* claim was "moot" because the FTCA rationale meant "that the activities of the officers were reasonable under the circumstances known to the officers at the time they took their action").

court of appeals then squarely decided the issue giving rise to the question presented. It held, as the government has advised this Court, that a "FTCA judgment [does] bar [a] *Bivens* judgment in the same suit." BIO 7, *Manning v. United States*, No. 08-1595, *cert. denied*, 130 S. Ct. 552 (Nov. 9. 2009).

Because the court of appeals thus "passed upon" the question presented, and because it would be unreasonable to hold that petitioners were required to brief not merely the judgment bar (which they did), but also every subsidiary issue possibly implicated by the government's passing invocation of that alternative ground for affirmance, this Court has jurisdiction and petitioners did not "waive" the issue. In *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), the Court applied its "traditional rule is that '[o]nce a federal *claim* is properly presented, a party can make any *argument* in support of that claim; parties are not limited to the precise arguments they made below.'" *Id.* (citing *Yee v. Escondido*, 503 U.S. 519, 534 (1992)) (emphasis added). Further, "even if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .'" *Id.* (collecting cases) (emphasis in original).

Because the only effect of denying review would be to allow this recurring circuit conflict to fester, certiorari should be granted.

2. Review also is warranted because this case perfectly illustrates the implausibility of the government's reading of the judgment bar. It is

undisputed that petitioners could not have invoked the FTCA to press their First Amendment *Bivens* claim that the agents interfered with their religious obligations, because that claim has no common law analog. *See* Pet. 24. Directly contrary to even the United States' one-sided explication of the judgment bar's purpose, petitioner had *zero* "opportunity" to "sue a financially responsible defendant" for the agents' unconstitutional conduct, BIO 19, so that the judgment bar here does not protect against "further litigation arising out of the same incident," *id.* 20, but instead entirely extinguishes petitioners' right to pursue that claim at all.

This Court's intervention is required because the Ninth Circuit would have permitted petitioners to pursue their *Bivens* claims. The United States acknowledges that *Kreines v. United States*, 959 F.2d 854 (9th Cir. 1992), "hold[s] that when the government prevailed on a plaintiff's FTCA claim, Section 2676 did not bar the plaintiff from recovering on a *Bivens* claim brought within the same suit." BIO 22. The assertion that *Kreines* reflects "an intra-circuit conflict," *id.*, is meritless. As the United States acknowledges, *id.*, *Kreines* expressly distinguishes prior Ninth Circuit authority. *See* 959 F.2d at 838. The government's submission that *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995), "cast doubt on" *Kreines*, BIO 23, is startling: on that very page, *Gasho* actually reaffirms the holding of *Kreines* that "an FTCA judgment in favor of the government [does] not bar the *Bivens* claim when the judgments are 'contemporaneous' and part of the same action." The government similarly fails to account for

district court rulings faithfully applying *Kreines*. *See* Pet. 23. Eighteen years after *Kreines*, and sixteen after *Gasho*, there is no prospect that the Ninth Circuit will depart from its long-settled position.

Nor can *Kreines*' holding be trivialized as a mere "exception" to a more general rule that the judgment bar applies to FTCA and *Bivens* claims brought in a single case. *Contra* BIO 21-22. When the plaintiff *prevails* on a FTCA claim, ordinary principles of remedy law already preclude a duplicative recovery under *Bivens*. The judgment bar thus has its principal effect when the plaintiff instead *loses* the FTCA claim, as in this case. As the many decisions giving rise to the circuit conflict demonstrate, that scenario recurs regularly.

3. Finally, there is no merit to the government's passing reliance on the denial of certiorari in No. 08-1595, *Manning v. United States*, *supra*. That case presented a question on which the courts of appeals are *not* divided: whether the judgment bar *ever* applies to FTCA and *Bivens* claims in the same suit. No. 08-1595 Pet. i. The circuit conflict presented by this petition was sufficiently tangential in *Manning* that the petition there urged it as a basis for review only in a single paragraph, Pet. 11, and the United States in turn addressed it only in a footnote, BIO 11 n.3. Further, the petitioner in *Manning* sought a double recovery: not only did his FTCA and *Bivens* claims overlap, but he was offered (but declined) the option to dismiss the FTCA claim and preserve his *Bivens* judgment. Finally, unlike *Manning*, this case permits the Court to consider the disposition of petitioners' FTCA and *Bivens* claims together,

and thus to address the interaction of those claims that lies at the heart of the judgment bar.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix

Excerpt from Government's Court of Appeals Brief

Section 2676 of title 28 provides

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

In *Freeze v United States*, 343 F.Supp.2d 477 (M.D.N.C. 2004, *aff'd* 131 Fed.Appx. 950 (4th Cir. 2005), 2005 WL 1220900, the district court noted that

> The judgment bar applies regardless of the outcome of the underlying FTCA action. *See Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 184-85 (7th Cir.1996) ("There is no indication that Congress intended that section 2676 to apply only to favorable FTCA judgments." This judgment bar precludes even constitutional claims against federal employees. *Id.* (" ' any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment' " (*quoting Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir.1994))).

See also Aetna casualty & Surety Co. v. United States, 570 F.2d 1197, 1200 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978). Section 2676 bars a *Bivens* claim against a government employee "arising out of the same actions, transactions, or occurrences" as an FTCA claim. *Harris v. United States*, 422 F.3d 322, 333 (6th Cir.2005); *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir.1986); *see also Arevelo v. Woods*, 811 F.2d 487, 490 (9th Cir.1987). Indisputably, plaintiffs' First and Fourth Amendment claims arise from the conduct of one or more of the members of the search team, all of whom were federal employees acting within the scope of their federal employment. Thus, entry of judgment in the United States' favor on the plaintiffs' claims under the FTCA precluded "any action" by the plaintiffs "against the employee of the government whose act or omission gave rise to the claim."